

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

GANNETT SATELLITE INFORMATION)	
NETWORK, INC,)	DOCKET NO.: CT-2003-5
Appellant,)	
-vs-)	
THE DEPARTMENT OF REVENUE)	<u>ORDER</u>
OF THE STATE OF MONTANA,)	
Respondent.)	

Gannett Satellite Information Network, Inc ("GANSAT") filed a motion for summary judgment with this Board. The Department of Revenue (DOR) opposed the motion and filed a partial motion for summary judgment. After review and consideration of the briefs and materials presented by both parties to the Board, the Board holds as follows:

Equitable Estoppel

The Department's motion for judgment as a matter of law relating to the issue of equitable estoppel is granted.

The doctrine of equitable estoppel does not bar the DOR deficiency assessment in this matter.

Equitable estoppel is well established in Montana law and has six elements which must be proved by clear and convincing evidence. As one of the first elements, equitable estoppel requires a misrepresentation or

concealment of a material fact. See, e.g., *Billings Post No. 1634*, *VFW v. DOR*, 284 Mont. 84, 90 943 P.2d 517, 520 (1997); *Elk Park Ranch, Inc. v. Park County* (1997), 935 P.2d 1131, 1137-38. GANSAT argues that equitable estoppel should bar the Department from assessing a deficiency notice for tax year 2000 after the Department issued a refund for the same tax year.

It is uncontested that the DOR issued a refund to GANSAT based on a refund request by GANSAT for the year 2000. During discussions between DOR and GANSAT relating to several tax years, the Department issued a refund for tax year 2000 to prevent the Department from being subject to paying interest on a refund request pursuant to § 15-31-531, MCA. The refund check was sent to GANSAT without additional notification to counsel or any other party at GANSAT. The staff at GANSAT deposited the check. Upon later review of tax year 2000, DOR issued a deficiency assessment for that tax year.

This set of facts does not constitute a concealment of material facts as argued by GANSAT. GANSAT argues that the mailing of the refund check suggested that the 2000 tax year issues were resolved. At the same time, however, the DOR has issued to GANSAT a request for information relating to the 2000 tax year that was still outstanding. GANSAT staff deposited the check.

It cannot be the responsibility of the Department to preemptively notify GANSAT of correspondence DOR sends. Failure to do so is not a "concealment of material facts." DOR actions did not prevent GANSAT from asserting any legal rights, such as rejecting the refund check or other action.

GANSAT has not proven the necessary elements for equitable estoppel and we hold that the deficiency assessment is not barred.

Business Income

The Department's motion for judgment as a matter of law is granted on whether the definition of business income under §15-31-302(1), MCA, comprises two independent tests.

The key issue in this matter is whether the sale of Cablevision by Gannett, the parent corporation of GANSAT, constitutes business or non-business income for purposes of corporate tax owed in Montana. Business income is defined in Montana law as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations." Section 15-31-302(1), MCA.

The taxpayer and the Department disagree on the interpretation of the statutory definition of business income. The Board has determined that it is proper to set

forth a ruling on the legal interpretation prior to a hearing to assist the parties in presenting evidence to the Board.

The definition of business income is derived from UDITPA (Uniform Division of Income for Tax Purposes Act). The language drawn from UDITPA has created a split in the manner in which state courts have addressed the definition of business income. The debate relevant to this matter is whether the two clauses of § 15-31-302(1), MCA, collectively express a single test or whether the second clause is a separate and independent test for determining whether income is business or non-business income.

This particular section of UDITPA was drafted in 1957, and comments were updated in 1966. Comments on the above section are as follows: "This definition refers to 'the' taxpayer's trade or business as if he had one business. It is not intended by this language to require a taxpayer having several 'businesses' to use the same allocation and apportionment methods for the businesses. The language permits separate treatment of different businesses of a single taxpayer. Section 18 clearly permits separate treatment. . . . Income from the disposition of property used in a trade or business of the taxpayer is includible within the meaning of business income." National Conference

of Commissioners on Uniform State Laws, Uniform Division of Income for Tax Purposes Act, 1966.

Since 1957, many states have implemented this definition of business income. With the definition, many state courts have discussed its implications in regard to income and what the implication of its two part definition may be.

The first clause is traditionally construed as a "transactional test". A number of State courts, such as Kansas, New Mexico, and Tennessee, have held that the UDITPA business income definition contains only the transactional test. Other state courts have interpreted the second part of § 15-31-302(1), MCA, to constitute a second, independent "functional" test. (Illinois, Indiana, Oregon, North Carolina, California).

Upon review of Montana statute, we determine that Montana law specifically contemplated both a "transactional" and a "functional" test for business income. We construe the statute as a whole in order to avoid an absurd result and to give effect to the statute's purpose. *S.L.H. v. State Comp.*, 303 Mont. 364, 369, 15 P.3d 948, 953.

In this case, the statutory language is clear in stating two separate clauses which must be considered in determining whether income is business or non-business

income. The Board deems that Montana law recognizes both a "transactional" and a "functional" test for business income.

Unitary Group

The Board also grants summary judgment in favor of the Department and finds that GANSAT, Gannett and Cablevision were all members of the same unitary group.

Section 15-31-301(1), MCA, requires a corporation having income from a business activity which is taxable within and outside of Montana to allocate and apportion its net income. A state may apportion income of a multi-state, non-domicilliary corporation when there is a unitary business relationship or where an intangible asset serves an operational, rather than investment function. *Allied-Signal, Inc. v Director, Division of Taxation*, 504 U.S. 768, 787, 112 S.Ct. 2251, 2263(1992). A business is considered "unitary" when the operation of the business within the state is dependent upon or contributory to the operation of the business outside the state or if the units of the business within and without the state are closely allied and not capable of separate maintenance as independent businesses. Section 15-31-301(2), MCA.

The Department argues that GANSAT, Gannett and Cablevision are unitary for purposes of determining whether the income from the sale of Cablevision should be categorized as business or non-business income. GANSAT

argues that a business can be unitary only if the facts and circumstances show centralization of management, functional integration and economies of scale. See, e.g. *Allied-Signal, Inc. v Director, Division of Taxation*, 504 U.S. 768, 787, 112 S.Ct. 2251, 2263 (1992).

It is undisputed that GANSAT and its parent corporation, Gannett, affirmatively reported GANSAT, Gannett, and Cablevision as unitary to the Montana Department of Revenue for all years Cablevision was owned by Gannett. Based on a Multistate Tax Commission audit in the late 80's, Gannett's tax department began filing as a unitary group, having determined that this approach was a reasonable one. Further, after the acquisition of Cablevision, Gannett made a deliberate business decision not to conduct an evaluation of which companies to include in a unitary filing but to continue filing all companies as one group. (GANSAT's Statement of Facts, 63.a., b., and e.). These management strategies are an admission that the entities are engaged in a unitary business. The Board is also satisfied that there is sufficient centralization of management and functional integration of GANSAT, Gannett and Cablevision to establish a unitary relationship.

There is no question that Cablevision was one of Gannett's principal business segments from 1995-1998. (GANSAT's Opposing Statement of Facts, 4; DOR Reply Brief p.

9.) GANSAT represented to Montana Department of Revenue, via its tax filings, that Cablevision was a member of Gannett's combined group from the time of its acquisition in 1995 to 2000. (GANSAT's Opposing Statement of Facts, 21.) GANSAT also reported Cablevision as part of the Gannett combined group in 14 other states. (GANSAT's Opposing Statement of Facts, 23.) There is a fair legal argument, in addition to the factual information, that GANSAT is properly held to the unitary filing position from other states. See *Russell Stover Candies, Inc. v. Dep't of Revenue* (1983), 204 Mont. 122, 665 P.2d 198.

There is no dispute that GANSAT is, and continues to be, a member of the Gannett unitary group. In addition, on every Montana corporation license tax return filed in 1995, 1996, 1997, 1998 and 1999, GANSAT included all income derived from Cablevision as business income. (GANSAT's Opposing Statement of Fact, 24.)

Now, Gannett argues that it has "primary business lines" rather than unitary businesses. (GANSAT's Motion for Summary Judgment and Brief in Support, p 33). It cannot be argued, however, that its own tax filings comport with that argument.

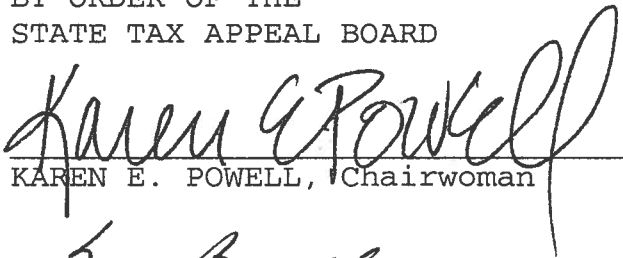
This ruling does not prevent GANSAT from arguing that the income from the sale of Cablevision is non-business income. As noted by the U.S. Supreme Court in *Allied*, the

existence of a unitary relationship is one justification for apportionment, but not the only one.

GANSAT's motion for summary judgment is denied. The Department's motion for summary judgment is partially granted and partially denied. Hearing in this matter is set for August, unless either party files for interlocutory appeal.

DATED this 16th day of May, 2007.

BY ORDER OF THE
STATE TAX APPEAL BOARD


KAREN E. POWELL, Chairwoman

(S E A L)


SUE BARTLETT, Member

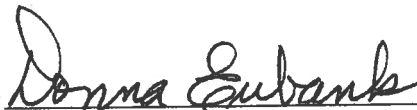

DOUGLAS A. KAERCHER, Member

CERTIFICATE OF SERVICE

I certify that on this 17th day of May, 2007, a true and correct copy of the foregoing Order was served by placing same in the United States Mail, postage prepaid, and addressed as follows:

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A handwritten signature in cursive script, reading "Donna Eubank", written over a horizontal line.

DONNA EUBANK
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